IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

NO. _____

78-670

WILLIAM A. HANKS,
Petitioner,

v.

U. S. ATTORNEY AND U. S. MARSHAL
AND LOS ANGELES COUNTY SHERIFF,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM A. HANKS
2858 Delta Avenue
Long Beach, California
90810

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

NO._____

WILLIAM A. HANKS,
Petitioner,

v.

U. S. ATTORNEY AND U. S. MARSHAL
AND LOS ANGELES COUNTY SHERIFF,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM A. HANKS
2858 Delta Avenue
Long Beach, California
90810

TABLE OF CONTENTS

Page

MEMORANDUM.....1

JURISDICTION.....2

QUESTIONS PRESENTED.....2

STATEMENT OF THE CASE.....5

CONSTITUTIONAL PROVISIONS INVOLVED.....7

REASONS FOR GRANTING WRIT.....7

CONCLUSION.....22

CERTIFICATE.....23

APPENDIX

A. Memorandum of Court of Appeals for the Ninth Circuit.....24

B. Order of United States District Court for Central District of California.....26

C. Request for court-appointed counsel....29

D. Motion to reconsider request for court-appointed counsel.....33

TABLE OF AUTHORITIES

Argersinger v. Hamlin, 407 U.S. 25.....2,8,9

Brown v. United States, 264 F.2d 363.....19,20

Brushaber v. Union Pac. R.R. Co.,
240 U.S. 1.....5

Carnley v. Cochran, 369 U.S. 506.....18

Coppedge v. United States, 369 U.S. 438.....21

Faretta v. California,
422 U.S. 806.....2,3,7-13,15,17,20

Gibbons v. Ogden, 9 Wheat. 1.....15,16

Gideon v. Wainwright, 372 U.S. 355.....2,3,8,9

Glasser v. United States, 315 U.S. 60.....14

Griffin v. Illinois, 351 U.S. 12.....22

Johnson v. Zerbst,
304 U.S. 458.....2,6,8,9,10,18

Mayberry v. Pennsylvania,
400 U.S. 455.....18,19,20

M'Clusky, Ex Parte,
40 F. 71.....11

Powell v. Alabama, 287 U.S. 45.....2,8,9

Robb v. United States, 111 U.S. 624.....22

Simmons v. United States, 390 U.S. 377.....18,21

United States v. Plattner, 330 F. 2d 271.....16

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

NO._____

WILLIAM A. HANKS,
Petitioner,

v.

U. S. ATTORNEY AND U. S. MARSHAL AND LOS ANGELES COUNTY SHERIFF,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner respectfully prays that a Writ of Certiorari issue to review the memorandum of the Court of Appeals for the Ninth Circuit entered in the above case on March 30, 1978.

MEMORANDUM BELOW

The Memorandum of the Court of Appeals is appended hereto as Appendix A.

JURISDICTION

Memorandum of the Court of Appeals entered March 30, 1978; rehearing and hearing en banc denied July 21, 1978. The jurisdiction of this Court is invoked under Title 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Have Powell v. Alabama, 287 U.S. 45 (1932); Johnson v. Zerbst, 304 U.S. 458 (1938); Gideon v. Wainwright, 372 U.S. 335 (1963) and Argersinger v. Hamlin, 407 U.S. 25 (1972) survived, or in any way been modified by Faretta v. California, 422 U.S. 806 (1975)?

   This question is provoked by the statement which appears on page 832 of the Faretta opinion, and is quoted as follows:

   > "There can be no blinking the fact that the right of an accused to conduct his own defense seems to cut against the grain of this Court's decisions holding that the constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel. See Powell v. Alabama, 287 U.S. 45; Johnson v. Zerbst, 304 U.S. 485; Gideon v. Wainwright, 372 U.S. 335; Argersinger v. Hamlin, 406 U.S. 25. For it is surely true that the basic thesis of those decisions is that the help of a lawyer is essential to assure the defendant a fair trial." (Emphasis added).

2. When the Faretta Court said "...seems to cut against the grain...." (Emphasis added), did it mean actually?

3. Does mere self-representation ipso facto consitute an intelligent and valid waiver of the right to have the "Assistance of Counsel", so as to prevent such counsel from helping the pro se accused who wants such help?

4. Can a request by the pro se accused for court-appointed counsel to help him with his pro se defense be constitutionally denied for the mere reason that he is pro se?

5. Can counsel give assistance to the accused without actually representing him, so that the accused can enjoy both the right of self-representation as well as the right to have the "Assistance of Counsel"?

6. Will this Court make a distinction between representation by counsel and assistance of counsel, so that when the accused represents himself he is only giving up the right to be represented by another, and is not giving up the right to have the assistance of counsel?

7. While self-representation and representation by another are rights that are clearly mutually exclusive, is it not equally clear that self-representation and assistance of counsel are actually co-existing and conjoining rights?

8. Doesn't the Sixth Amendment mean that self-representation and the "Assistance of Counsel" are rights to be simultaneously enjoyed by the

accused, and that self-representation is to be supplemented by the "Assistance of Counsel"?

The following questions are related to the basic question of whether it is the duty of the Court or the accused to enforce the rights that are guaranteed by the Constitution, and whether a court can constitutionally practice financial discrimination against the accused before it decides whether to enforce his right to the "Assistance of Counsel for his defense":

9. Can a federal court constitutionally refuse to enforce the "Assistance of Counsel" guarantee because the accused "failed" to prove he was "financially qualified"?

10. Can a federal court constitutionally limit the "Assistance of Counsel" guarantee to the limited financial resources of the accused?

11. Can a federal court constitutionally require a poor person to prove, without assistance of counsel, that he is "financially qualified" to have court assigned "Assistance of Counsel"?

12. Can a federal court constitutionally require a poor person to waive his Fourth Amendment right to privacy in order to prove he is "financially qualified" to enjoy his Sixth Amendment right to "Assistance of Counsel"?

STATEMENT OF THE CASE

This case arose out of an original habeas corpus action filed in United States Central District Court of California on January 10, 1977. Without requiring respondent to answer, trial judge denied petition for writ by order dated February 10, 1977. See Appendix.

Petitioner was indicted November 18, 1974: two counts alleging violations of § 7203 and two counts alleging violations of § 7205, both of Title 26, U.S.C. (Internal Revenue Code). He was convicted on all counts; sentenced to serve one year, concurrently; sentence was suspended and three year probation imposed on condition he serve 90 days in jail. His direct appeal was mishandled and conviction was affirmed. He was fired from his job on July 8, 1975, the day he was convicted and for the reason that said conviction was for crimes involving moral turpitude. Since then, he has been unemployed.

Prior to trial, he retained and paid private counsel $1,500 with instructions to defend him according to Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, which restricted the Sixteenth Amendment and the income tax to the category of indirect taxes (excise, impost or duty) for and to which he was neither liable nor subject. Said counsel refused to make the defense that he wanted and did not return his money so that he could obtain other counsel.

The trial judge relieved said counsel as attorney of record June 16, 1975, and denied

petitioner's carefully worded motion for court-appointed counsel "...to assist, not represent, but to assist...." him with his pro se defense. On July 1, 1975, a motion to reconsider also was denied, and on July 5, 1975 petitioner was forced to trial without any counsel at all.

Said motions for assistance of counsel did not seek representation by counsel under Title 18, U.S.C. § 3006A, but instead sought judicial enforcement of "Assistance of Counsel" which is expressly guaranteed by the Sixth Amendment, thus raising as the central issue of this case the distinction between "Assistance of Counsel" and representation by counsel as two different rights, and how each one affects and relates to the right of self-representation.

His petition for writ of habeas corpus was made under authority of Johnson v. Zerbst, 304 U.S. 458. The record shows that petitioner did not voluntarily and intelligently waive his right to have the "Assistance of Counsel" for his pro se defense. The trial judge refused to observe the difference between representation by counsel and "Assistance of Counsel". Since petitioner was pro se, he ruled that:

> "Petitioner made a knowing waiver of his right to counsel.
>
> . . . . .
>
> The right to appointed counsel is limited to persons 'financially unable to obtain adequate representation.' 18 U.S.C. 3006A."

In its Memorandum, the Court of Appeals for

the Ninth Circuit affirmed, stating:

> "Hanks had requested the appointment of counsel to assist him, but the District Court declined the request because Hanks failed to show that he was 'financialy unable to obtain adequate representation.' 18 U.S.C. § 3006A."
>
> "Hanks' present arguments are based on the premise that there is a distinction between the right to be represented by counsel and the right to such "assistance of counsel" as is guaranteed by the sixth amendment. This premise is undermined by Faretta v. California, 422 U.S. 806 (1975)."

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the Fifth and Sixth Amendments are as follows:

> "No person shall be...deprived of life, liberty, or property without due process of law...." Fifth Amendment.
>
> "In all criminal prosecutions, the accused shall enjoy the right to...have the Assistance of Counsel for his defence." Sixth Amendment.

REASONS FOR GRANTING THE WRIT

This case presents questions and issues that have not previously been decided by this Court. This case demonstrates a need for this

Court to decide if Faretta v. California, 422 U.S. 806 (1975) has in any way overruled or modified Powell v. Alabama, 287 U.S. 45 (1932); Johnson v. Zerbst, 304 U.S. 458 (1938); Gideon v. Wainwright, 372 U.S. 335 (1963) and Argersinger v. Hamlin, 407 U.S. 25 (1972).

The Faretta ruling needs to be clarified to settle the issue as to whether it is possible that the two rights of self-representation and "Assistance of Counsel", both being guaranteed by the Sixth Amendment, can be simultaneously enjoyed. Can counsel assist without actually representing the accused, so that the accused can enjoy both his self-representation right and his assistance of counsel right?

A statement contained on page 832 of the Faretta Court's decision needs to be clarified. That statement is quoted as follows:

> "There can be no blinking the fact that the right of an accused to conduct his own defense seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to assistance of counsel. See Powell v. Alabama, 287 U.S. 45; Johnson v. Zerbst, 304 U.S. 458, Gideon v. Wainwright, 372 U.S. 335, Argersinger v. Hamlin, 407 U.S. 25. For it is surely true that the basic thesis of those decisions is

> that the help of a lawyer is essential[1] to assure the defendant a fair trial." (Emphasis added).

We need to know whether self-representation does in fact "...cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to assistance of counsel". The remark made by the Faretta Court when it said: "...seems to....", needs clarifying. We need a ruling to settle once and for all whether, or to what extent, Powell, Johnson, Gideon and Argersinger have survived or have been affected by the Faretta ruling.

In Johnson v. Zerbst, supra, at 467, this Court said:

> "Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty." (Emphasis added).

The dissenting opinions in Faretta reveal the kind of problems that are created when no distinction is made between representation by

---

[1] Essential: Belonging to the very nature of a thing and therefore incapable of removal without destroying the thing itself or its character. Webster's Dictionary.

counsel, on the one hand, and assistance of counsel on the other. Self-representation, obviously, precludes representation by someone else, and visa versa. But, the big question is: Does self-representation necessarily preclude the accused from having assistance of counsel as a subordinate helper for his pro se defense?

This question was never actually decided by the Faretta Court, or by any other court.

For example, mark the difference between what was actually decided in Faretta and Johnson v. Zerbst, supra. The Johnson Court said that the "...assistance of counsel...is an essential jurisdictional prerequisite...." (Emphasis added). Id., 467.

The Faretta Court, dealing with a very different question, said that representation by counsel "...can only be justified, however, by the defendant's consent, at the outset, to accept counsel as his representative." (Emphasis added). Id., 820-21.

An "essential jurisdictional prerequisite" in a criminal prosecution, obviously, cannot depend upon the accused's "consent". Moreover, the Johnson Court also describes the assistance of counsel as a "...constitutional mandate....", and "If this requirement is not complied with, the court no longer has jurisdiction to proceed." (Emphasis added). Id., 467.

Johnson and Faretta, once purged of their extraneous dictum, clearly demonstrate a very sharp distinction between representation by

counsel, on the one hand, as being strictly a matter of consent on the part of the accused; and the assistance of counsel, on the other hand, as being a constitutional mandate and an essential jurisdictional prerequisite.

Clearly, representation by counsel can be waived by the accused. But, the assistance of counsel is a constitutional mandate and also an essential jurisdictional prerequisite. How, then, can it be waived by anyone? In a slightly different context, Judge Parker, speaking for the Eighth Circuit in Ex Parte M'Clusky, 40 F. 71, 74-75, said:

> "A party cannot waive a constitutional right when its effect is to give a court jurisdiction.
>
> . . . . .
>
> "In this country the state and the law have such a great interest in the life and liberty of the citizen as to see to it that such life or liberty shall not be taken away, even with the consent of the citizen, whose liberty is taken; but it must be taken by due process of law." (Emphasis added).

Unlike your petitioner, who requested the court to appoint counsel to assist[2] him with his pro se defense, Anthony Faretta apparently wanted to make his defense alone, that is,

---

[2]Petitioner's request was made pursuant to the Sixth Amendment and not pursuant to U.S.C. (Title 18) 3006A.

without any counsel at all. This is surmised from the Faretta Court's opinion, e.g., on page 808, that he "...did not want a lawyer...." (Emphasis added). Also, on page 835, that he "...did not want counsel." (Emphasis added). And on page 807 the Court said:

> "The question before us now is whether a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so. Stated another way, the question is whether a State may constitutionally...force a lawyer upon him, even when he insists that he wants to conduct his own defense. It is not an easy question...." (Emphasis added).

True, it is not an easy question when the court was never asked to distinguish between representation by counsel and assistance of counsel. With three dissenters, the Court ruled "...we have concluded that a State may not constitutionally do so." Of course, the ruling was in the context that an accused has a constitutional right to represent himself.

Yet, the Court revealed it was not entirely satisfied when it pondered its ruling and said that it

> "...seems to cut against the grain of this Court's decisions holding that the constitution requires that no accused can be convicted and imprisioned unless he has been accorded the right to the assistance

> of counsel. (Cases cited). For it is surely true that the basic thesis of those decisions is that the help of a lawyer is essential to assure the defendant a fair trial." Id.

This dilemma is unnecessarily created only by failing to appreciate the crucial difference between the meanings of two different words: representation and assistance. The dilemma evaporates upon realizing that while one cannot represent himself and be represented at the same time by someone else, one can, however, have the assistance of counsel while one is representing himself. And while one can only be represented by one lawyer, one can still have the assistance of several. No question involving the distinction between assistance of counsel and representation by counsel was before the Faretta Court.

We now try to reconcile the divided Faretta Court. We ask the Court to unanimously declare that the right of self-representation and the right to have the "Assistance of Counsel", which are both guaranteed by the Sixth Amendment, are neither conflicting nor mutually exclusive, and that to the contrary, the right to have the "Assistance of Counsel" is meant to be enjoyed simultaneously with and as a supplement to the right of self-representation.

The facts of Faretta are distinguished from those of your petitioner, who feels that self-representation is dangerous and foolhardy, if

it means that he must defend himself without any counsel at all to help him. Indeed, self-representation as a constitutional right is almost meaningless, unless, it is supplemented by the expressly guraranteed right to have the "Assistance of Counsel", so that a fair trial could be had. Petitioner did not "voluntarily and intelligently" elect to represent himself without counsel to help him with his pro se defense. By written motions, he requested the trial court to appoint counsel to assist, not to represent, but to assist[3] him with his pro se defense. See motions in Appendix C and D.

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." (Emphasis added). Glasser v. United States, 315 U.S. 60.

Petitioner wants to represent himself, but he does not want to be forced into making his defense all alone. He wants counsel to help him, as the Sixth Amendment guarantees. Therefore, he requested, but was denied, assistance of counsel to help him with his pro se defense. In its "DO NOT PUBLISH" Memorandum, the Court of Appeals for the Ninth Circuit said:

---

[3]Petitioner's request was made pursuant to the Sixth Amendment and not pursuant to U.S.C. (Title 18) 3006A.

> "Hanks' present arguments are based on the premise that there is a distinction between the right to be represented by counsel and the right to such 'assistance of counsel' as guaranteed by the sixth amendment. This premise is undermined by Faretta v. California, 422 U.S. 806 (1975)." (Emphasis added). See Appendix A.

Your petitioner contends that Faretta does not compel a trial court to refuse to enforce the "Assistance of Counsel" guarantee because the accused is representing himself. Indeed, petitioner argues that Faretta is authority for the appointment of "standby counsel" to help the pro se defendant. For example, in a footnote on page 835, the Faretta Court said:

> "Of course,...[the court] may—even over the objection of the accused—appoint a 'standby counsel' to aid the accused if and when the accused requests help...." (Emphasis added).

In reviewing the history of self-representation, the Court observed, on pages 829-30:

> "The right of counsel was clearly thought to supplement the primary right of the accused to defend himself...." (Emphasis added).

In Gibbons v. Ogden, 9 Wheat. 1, 83, Chief Justice John Marshall said:

> "As men, whose intentions require no concealment, generally employ the words

which most directly and aptly express the ideas they intend to convey; the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they said." (Emphasis added).

And in United States v. Plattner, 330 F.2d 271, 273-4, Judge Medina, speaking for the Second Circuit, said:

"Under the Fifth Amendment, no person may be deprived of liberty without due process of law. Minimum requirements of due process in federal criminal trials are set forth in the Sixth Amendment....

"The framers of the Sixth Amendment recognize that a defendant in a criminal case is not likely to be sufficiently learned in the law effectively to assert all of his guaranteed rights. They understood that excessive emotional involvement in the outcome of his case might paralyze the accused in his ability to organize his defense, examine and cross-examine witnesses, and present cogent argument in support of his cause. Therefore, to buttress and supplement all the other rights of a defendant charged with crime, the final clause of the Sixth Amendment protects the right of the accused 'to have the Assistance of Counsel for his defense." (Emphasis added).

The Sixth Amendment's express guarantee of "Assistance of Counsel" was never meant to interpose a master over the accused in conflict with his own right of self-representation. To the contrary, it is clearly meant to guarantee counsel as a supplement to his right of self-representation, as a helper, subordinate to the accused, to help "when the accused requests help", as a consultant and as "standby counsel". To suggest otherwise,

"...violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of its personal character upon which the Amendment insists." Faretta, supra, 820. (Emphasis added).

Moreover, to say the Sixth Amendment does not guarantee counsel as a supplement to the right of self-representation, but instead as a master over the accused, creates a conflict between the two guaranteed rights of self-representation and "Assistance of Counsel". It creates the false idea that in order to assert the right of self-representation, the right to "Assistance of Counsel" must be forfeited.

Petitioner argues that there is no conflict between self-representation and "Assistance of Counsel", as guaranteed by the Sixth Amendment. The two rights are meant to be harmonious, and to be simultaneously enjoyed by the accused. This Court should find "...it intolerable that one constitutional right should have to be

surrendered in order to assert another." Simmons v. United States, 390 U.S. 377, 394.

Johnson v. Zerbst, 304 U.S. 458, 464 (1938), and Carnley v. Cochran, 369 U.S. 506, 516 (1962) said:

> "Courts indulge every reasonable presumption against waiver" and "do not presume acquiescence in the loss of fundamental rights."

He also argues the "Assistance of Counsel" is to help the court as well as the accused. It is not merely the accused's personal right, but it is equally the public's right as well. The public has an equal interest in both the prosecution and the defense, in order that the guarantee of a fair trial can become a reality. This view is shared by the Chief Justice of this Court.

Concurring in Mayberry v. Pennsylvania, 400 U.S. 455, 467-8, Chief Justice Burger said:

> "Here the accused was acting as his own counsel but had a court-appointed lawyer as well. This suggests the wisdom of the trial judge in having counsel remain in the case even in the limited role of a consultant. When a defendant refuses counsel, as he did here, or seeks to discharge him, a trial judge is well advised as so many do—to have 'standby counsel' to perform all the services a trained advocate would perform ordinarily by examination and cross-examination of witnesses, objecting to evidence and making

> closing argument. No circumstance that comes to mind allows an accused to interfere with the absolute right of a trial judge to have such 'standby counsel'.... In every trial there is more at stake than just the interests of the accused.... A criminal trial is not a private matter; the public interest is so great that the presence and participation of counsel, even when opposed by the accused, is warranted in order to vindicate the process itself." (Emphasis added).

And, before he became Chief Justice of this Supreme Court, Mr. Justice Burger, concurring in Brown v. United States (D.C. Cir. 1959) 264 F.2d 363, 369, also stated:

> "It is axiomatic that more than the rights of an accused are involved in a criminal case. In some circumstances, for example, where an indictment covers such comples questions of law and fact that the court thinks the accused unable to understand their import, an amicus curiae could properly be appointed without the accused's consent. The accused should, however, still be permitted to present his own case without reference to what is presented by the amicus curiae. Vindication of the process of justice would require such a procedure...." (Emphasis added).

It is interesting to note that "friend of the court" (amicus curiae) was again only recently mentioned by the Chief Justice, this time in his dissent to the Faretta ruling:

> "Some of the damage we can anticipate from a defendant's ill advised insistence on conducting his own defense may be mitigated by appointing a qualified lawyer to sit in the case as the traditional 'friend of the court'. The Court does not foreclose this option." (Emphasis added).

When Chief Justice Burger said: "The Court does not foreclose this option", it is very clear that the three-judge panel speaking for the Ninth Circuit was in error when it said that the premise that there is a distinction between representation by and assistance of counsel "...is undermined by Faretta v. California, 422 U.S. 806 (1975)." Clearly, Faretta does not undermine, but rather supports the distinction.

"Standby counsel", said the Chief Justice concurring in Mayberry, supra, is also "...the absolute right of the trial judge....", and one which the accused cannot "...interfere with...." (Emphasis added). If the Chief Justice is correct, and we believe he is, then the accused cannot waive standby counsel.

Furthermore, of equal importance is the fact that where "standby counsel" can be appointed "without the accused's consent", Brown, supra, 369, and "even when opposed by the accused", Mayberry, supra, 468, and "even over the objection of the accused", Faretta, supra, 835, footnote 46, then it is clear that "standby counsel" can be appointed even if the accused failed to show that he was 'financially unable

to obtain adequate representation'".[4] Such questions regarding the accused's financial status become totally immaterial and irrelevant.

The practice of compelling a poor person to waive his Fourth and Fifth Amendment rights to privacy in order to prove that he is financially qualified to have the court enforce his Sixth Amendment right to "Assistance of Counsel" is unconstitutional. This judge-made doctrine is bad. Compelling the poor to waive their financial privacy right before the court will enforce their "Assistance of Counsel" right and a fair trial, denies equal protection. Again, we ask this Court to find "...it intolerable that one constitutional right should have to be surrendered in order to assert another." Simmons, supra.

> "The methods we employ in the enforcement of criminal law have aptly been called the measures by which the quality of our civilization may be judged." Coppedge v. United States, 369 U.S. 438, 449.

Another constitutional infirmity from which this judge-made doctrine suffers is void for vagueness. The cost of the defense involves too many unknown factors. No judge can make a valid pre-trial determination of how much it will cost to properly defend the accused. Investigation into the facts of the case is extremely important. The trial judge cannot

---

[4] See District Court order and Court of Appeals Memorandum.

perform such an investigation. If the only defense which the accused has is a constitutional defense, then he certainly is entitled to have it properly made, all the way to this Supreme Court, if necessary. Such a defense is a luxury which very few defendants can afford.

> "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." Griffin v. Illinois, 351 U.S. 12, 19.

Finally, a constitutional guarantee is meaningless if the courts will not enforce it, and our quality of civilization is lost if our courts ignore our rights and leave us to our own devises.

> "Upon the...courts...rests the obligation to guard, enforce and protect every right granted or secured by the Constitution." Robb v. Connolly, 111 U.S. 624, 637.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the Memorandum of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

William A. Hanks
2858 Delta Avenue
Long Beach, California
90810

October 18, 1978

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that my business address is 479 E. Colorado Boulevard, Pasadena, California 91101, that on October , 1978. I served the within PETITION FOR WRIT OF CERTIORARI, HANKS v. U.S. ATTORNEY AND U.S. MARSHAL AND LOS ANGELES COUNTY SHERIFF, on the following named parties by depositing the designated copies thereof in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Pasadena, California, addressed to said parties at the addresses as follows:

SOLICITOR GENERAL OF THE UNITED STATES
U.S. DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

UNITED STATES ATTORNEY
FOR THE CENTRAL DISTRICT OF CALIFORNIA
12TH FLOOR, U.S. COURTHOUSE
LOS ANGELES, CALIFORNIA 90012

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October , 1978 at PASADENA, CA.

William Munson

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM A. HANKS,
Appellant,

vs.

U.S. ATTORNEY and U.S. MARSHAL and LOS ANGELES COUNTY SHERIFF,
Appellees.

No. 77-1553

MEMORANDUM

[March 30, 1978]

Appeal from the United States District Court
for the Central District of California

Before: ELY, TRASK, and ANDERSON, Circuit Judges.

In a jury trial, Hanks was found guilty of four misdemeanors involving the violation of certain federal taxation statutes, 26 U.S.C. §§ 7203, 7205. Prior to that trial, Hanks had requested the appointment of counsel to assist him, but the District Court declined the request because Hanks failed to show that he was "financially unable to obtain adequate representation." 18 U.S.C. § 3006A. Hanks questioned this ruling on a direct appeal to our court, but the contention was rejected and the conviction affirmed in this court's unpublished Order of June 7, 1976. The Supreme Court denied Hanks' application for certiorari on October 12, 1976. 429 U.S. 887 (1976).

Thereafter, on January 11, 1977, Hanks filed, in the District Court, a petition for relief under 28 U.S.C. § 2255. The court denied the petition in an Order, which, though not a part of the record, is attached as an appendix to Hanks' opening brief in the present appeal.

All three of the issues now presented by the appellant relate to the District Court's refusal to appoint counsel to assist Hanks

in the original trial. The contention as to this issue was raised by Hanks in his direct appeal from his conviction. There, Hanks argued:

> Though proceeding in propria persona, appellant Hanks requested and was denied the assistance of counsel, and was thus denied his constitutionally protected right to a fair trial and to effective assistance of counsel.

As we have above stated, that argument was previously rejected by our court. Thus, it is highly questionable that Hanks may again properly raise the question. *Argo v. United States,* 473 F.2d 1315, 1317 (9th Cir.), *cert. denied,* 412 U.S. 906 (1973). And, as our court had previously written:

> Section 2255 cannot take the place of an original appeal. More properly stated, § 2255 may not be invoked to relitigate questions which were or should have been raised on a direct appeal from the judgment of conviction.

United States v. Marchese, 341 F.2d 782, 789 (9th Cir.), *cert. denied,* 382 U.S. 817 (1965).

Despite the above, the District Court considered the merits of Hanks' petition under section 2255, perhaps because of a tangentially relevant decision by the Supreme Court in *Kaufman v. United States,* 394 U.S. 217 (1969). Assuming, *arguendo,* that Hanks may again raise the questions that he now seeks to raise, we hold that the three contentions have no merit. Hanks' present arguments are based on the premise that there is a distinction between the right to be represented by counsel and the right to such "assistance of counsel" as is guaranteed by the sixth amendment. This premise is undermined by *Faretta v. California,* 422 U.S. 806 (1975). *Faretta* quite clearly indicates that the right to counsel guaranteed by the sixth amendment is, in fact, the right to the "assistance" of counsel. *Id.* at 820-21.

AFFIRMED.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 4-4-78—400

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WILLIAM A. HANKS,

Petitioner,

vs.

U.S. ATTORNEY and U.S. MARSHAL and LOS ANGELES COUNTY SHERIFF,

Respondents.

No. CV 77-111-RF

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner was convicted by jury trial of two counts of claiming false withholding exemptions (26 U.S.C. §7205), and two counts of failing to file income tax returns (26 U.S.C. §7203). Conviction was affirmed on appeal.

Petitioner has filed a petition for writ of habeas corpus raising grounds which could have been raised on appeal.

Federal habeas corpus (28 U.S.C. §2255) "may not be invoked to relitigate questions which were or should have been raised on direct appeal from the judgment of conviction." Hammond v. United States, 408 F.2d 481, 483 (9th Cir. 1969). This rationale alone justifies denial of the petition.

The merits of the petition, however, have been considered.

Petitioner raises five contentions, all of which involve the alleged denial of assistance of counsel at trial. He urges: 1) his Fifth Amendment due process rights and his Sixth Amendment right to assistance of counsel were denied by the court's "forcing him to trial without such assistance and without his ever having waived his right to have such assistance;" 2) his Sixth Amendment right to counsel were denied by the court's refusal to appoint counsel without regard to his financial ability to retain counsel; 3) his Fourth Amendment right to financial privacy were denied by the court's inquisition into his private financial condition; 4) his Fifth and Fourteenth Amendment due process rights were violated by the court's imposition of an unconstitutionally vague standard deeming that petitioner was"not qualified" for court-appointed counsel; 5) his Fifth Amendment right to due process was violated by the court's conflict of interest between its duty to enforce his right to counsel and its undue concern for the public coffers.

Petitioner's first contention that he was forced to trial without counsel and without having waived counsel is not supported by the record. Petitioner made a knowing waiver of his right to counsel. In a "Supplement to Petition for Writ of Habeas Corpus", petitioner contends that while he waived his right to be represented by counsel, he did not waive his right to assistance of counsel. Apparently petitioner is complaining of the court's denial of his motion for appointment of counsel to assist him to represent himself. Since he had no right to appointment of counsel to represent him for reasons stated infra, he had no right to

appointment of counsel to assist him.

Petitioner's second contention also fails. He had no right to appointed counsel without regard to financial ability to retain counsel. The right to appointed counsel is limited to persons "financially unable to obtain adequate representation." 18 U.S.C. 3006A. Petitioner has the burden of proof of financial status. United States v. Ellsworth, ____F.2d ____ (9th Cir. Dec. 28, 1976); United States v. Schmitz, 525 F.2d 793 (9th Cir. 1975).

Petitioner's third, fourth and fifth contentions are legally frivolous.

The petition for writ of habeas corpus is denied.

Dated this 10th day of February, 1977.

Robert Firth, Judge of the
United States District Court

Copies to:

William A. Hanks #420-6611
441 Bouchet Street
Los Angeles, California

Alexander Williams,
Asst. United States Attorney

APPENDIX B

WILLIAM A. HANKS
2858 Delta Avenue
Long Beach, California
(213) 424-7369

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

PEOPLE OF THE UNITED STATES OF AMERICA, Plaintiff, vs. WILLIAM A. HANKS, Defendant.	CR-74-1153 RF No. CR-74-1676 RF REQUEST FOR COURT APPOINTED COUNSEL WITHOUT REGARD TO DEFENDANT'S FINANCIAL CONDITION

Defendant WILLIAM A. HANKS requests and demands that notwithstanding his financial condition this court must, under authority of the 6th Amendment of the United States Constitution appoint counsel to assist him (not to represent, but to assist) in making his defense in this criminal prosecution, as is his guaranteed right under said 6th Amendment.

The plain and simple meaning of said 6th Amendment is herewith shown:

"In all criminal prosecutions the accused shall enjoy the right...to have the assistance of counsel for his defense."

(Emphasis added) 6th Amendment.

The practice of this court to appoint counsel only in cases where the accused "qualifies" because of his being "indigent" is unconstitutional. There is nothing in said 6th Amendment which limits this right only to those persons who are

APPENDIX C

"indigent", or who are willing to hire their own counsel. Moreover, by guaranteeing the right to have the assistance of counsel, the 6th Amendment at the same time is a safeguard to the right of self-representation.

It is the unconstitutional practice of this court to require accused persons in criminal prosecutions to waive their 4th Amendment right to privacy, if they want the assistance of counsel, and to subject them to a Star Chamber Inquisition in order for the court to make its determination as to whether or not the accused "qualifies" for court appointed counsel because of his being, in the court's estimation, an "indigent" person.

The 6th Amendment does not impose any conditions upon the guaranteed right to have the assistance of counsel. This right is not only for those who "qualify" for court appointed counsel by first proving that they are "indigent". This is a right guaranteed for every accused person in all criminal prosecutions: It is absolute and unconditional regardless of financial condition.

The 6th Amendment also guarantees the right to trial by jury, which the court has long recognized and for which it does not either require the accused to pay for, nor does it provide a jury without cost to him if he "qualifies" as an "indigent" person. How then can this court justify its practice of appointing counsel only in cases where the accused "qualifies" for said counsel by being an "indigent" person, when the language of the 6th Amendment which guarantees a jury trial is the same which guarantees the assistance of counsel?

Public funds are used to prosecute the accused because the public has an interest in seeing to it that crimes against it are properly prosecuted. But, the public has no interest in procuring convictions merely for the sake of doing so. To the contrary, the public has an overriding interest in seeing to it that justice is done. Therefore, the public has no less interest

in seeing to it that the accused, who is presumed innocent until proven guilty, is properly defended as it has in seeing to it that he is properly prosecuted. Clearly the public has the responsibility of providing equal funds for both the defense as well as the prosecution of every criminal case.

The presumption of innocence is the strongest presumption of the law. Yet this presumption is undermined and loses its meaning when this court fails to provide the accused with the assistance of counsel as guaranteed by the 6th Amendment. All criminal prosecutions are carried out under an adversary system. Vast and seemingly unlimited public funds are tapped to marshal a very formidable and tenacious prosecution. Prosecution lawyers who have everyday experience in prosecuting cases are assigned to prosecute the accused. Without the assistance of counsel, as guaranteed by the 6th Amendment, the accused, especially if he is a layman, hasn't a ghost of a chance in equaling their experience, their expert skill and their knowledge of law and legal procedure. The accused must have the assistance of counsel to safeguard his substantive and procedural rights.

The public has no interest in using the courtroom as an arena where a game of "cat and mouse" or "martyrs and lions" is carried out by the learned and experienced prosecutor, financed by public funds, against the unlearned, inexperienced defendant left to his own resources. Clearly, such a proceeding could not be a fair one; it would be to deny a fair trial, and fairness is he watchword of justice. The failure of this court to appoint counsel to assist this defendant in making his defense would be to violate his right which is guaranteed under the 6th Amendment.

> "The most odious of all oppressions are those which mask as justice."
>
> Kruelwitch v. United States, 336 U.S. 448, 458.

Therefore, William A. Hanks requests and demands that with-

out regard to his financial condition this court appoint the Federal Public Defender, John Van de Kamp, to assist (not to represent but to assist) him in making his defense, as guaranteed by the 6th Amendment to the United States Constitution.

Respectfully submitted,

William A. Hanks

POINTS AND AUTHORITIES:

6th Amendment to the United States Constitution.

APPENDIX C

WILLIAM A. HANKS
2858 Delta Avenue
Long Beach, California
(213) 424-7369

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

PEOPLE OF THE UNITED STATES OF AMERICA, Plaintiff, vs. WILLIAM A. HANKS, Defendant,	No. CR-74-1153 RF CR-74-1676 RF MOTION TO RECONSIDER REQUEST FOR COURT APPOINTED COUNSEL WITHOUT REGARD TO DEFENDANT'S FINANCIAL CONDITION

This motion to reconsider is made on the grounds that William A. Hanks needs the assistance of counsel in making his defense; that he has absolutely no trial experience; he doesn't know how to pick a jury; he doesn't know the procedure during trial as to making objections and examining witness and that to deny him his 6th Amendment guaranteed right "to have the assistance of counsel for his defense" would be to deny him a fair trial.

This motion is also made on the grounds that the Hon. E. Avery Crary of this Central District has recognized this important 6th Amendment right in the case of the United States v. Laverne Steiskal, case #CR13455 EAC, which was tried on or about December 1973. In that case, Judge Crary appointed Deputy Public Defender, John Hornbeck to assist defendant Stejskal notwithstanding the fact that he did not sign or make any financial statement. It is requested that this court take judicial notice of Judge Crary's action.

APPENDIX D

This motion is apported by the Affidavit of William A. Hanks.

Respectfully submitted,

Dated: June 23, 1975

WILLIAM A. HANKS

AFFIDAVIT OF WILLIAM A. HANKS

I, WILLIAM A. HANKS, declare and state:

1) That I am the defendant in the above-entitled action.

2) That during the initial stages of this matter I retained private counsel, G. G. Baumen to represent me.

3) That said G. G. Baumen misrepresented me, he attempted to compromise my rights, he tried to get me to prepare and sign a "1040" federal "income tax" form and he refused to make any such defense for me as outlined in my eleven page letter to him, dated March 20, 1975.

4) That said letter is annexed hereto as Exhibit "A" and is made a part of this affidavit.

5) That because of the facts stated in paragraph 3, it was necessary to discharge said G. G. Baumen.

6) That is my choice not to have any attorney represent me, but I do insist that this court appoint counsel to assist me.

7) That I have absolutely no trial experience and I am totally ignorant of trial procedure, and I have a tendancy to 'freeze up' in the courtroom and that I am in need of the assistance of counsel to assist during the trial to assist me in protecting my rights.

8) That the Federal Public Defender, John Van deKamp has personally received copies of my motions and it is my choice that he personally be appointed by the court to assist me.

I declare under penalty of perjury that the foregoing is true and correct.

Exeucted on this 23rd day of June, 1975 at Los Angeles, California.

WILLIAM A. HANKS